Ikhtilaf al-Fuqaha: Diversity in *Fiqh* as a Social Construction

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Ikhtilaf, which means disagreement, difference of opinion and diversity of views, especially among the experts of Islamic law, is widely recognised in Islamic tradition as a natural phenomenon. In its meaning of 'diversity', *ikhtilaf* is also a recurring theme in the Qur'an, with references to the diverse phenomena of nature and diversity as a sign of God and proof of God's existence and creation.[1] According to a saying of the Prophet Muhammad, diversity among the Muslim people is a blessing (*ikhtilafu ummati rahma*).[2] The Islamic tradition takes pride in sciences developed for studying the differences in the recitation and interpretation of the Qur'an and the differences in the transmissions of the *Hadith*, reports about Prophet Muhammad's statements, and the *Sunnah*, his practices. Since the beginning of the development of *fiqh*, *ikhtilaf* among the jurists not only existed, but was also respected.

In Islamic jurisprudence, *ikhtilaf al-fuqaha* (disagreement among the jurists) is one of the most frequently discussed subjects, yet current studies of Islamic law generally ignore its implications for the development of *fiqh* and its relevance for law reform in the modern context. It is neither possible nor advisable to analyse the doctrine of *ikhtilaf al-fuqaha* in detail in this short space. Therefore, this paper aims to underscore the significance of *ikhtilaf al-fuqaha* as a rich source for understanding the development of the Islamic legal tradition and as an important juristic tool to reinterpret Muslim family laws in today's globalised world in which difference is increasingly valued.

I. *Ikhtilaf* as a Basic Feature of Islamic Law

Historians narrate that when the Abbasid Caliph Mansur (re. 754–775) began unifying the caliphate, his secretary Ibn Muqaffa‘ (d. 759) advised the Caliph that the law and order situation was particularly problematic due to the lack of uniformity in judicial practice. *Qadis* at this time were issuing divergent and conflicting judgements, which caused legal chaos.[3] The Caliph came to know that Imam Malik was compiling or had compiled *al-Muwatta*, a compendium of the *Sunnah* of the Prophet as known and practised in Medina. On his pilgrimage to Mecca, he visited Imam Malik in Medina. Caliph Mansur proposed to Imam Malik that *al-Muwatta* be adopted as the law of the caliphate but Imam Malik disagreed with the Caliph’s wishes and persuaded him against it. In view of the significance of the dialogue between the Caliph and the jurist, I would like to quote the full story as reported in one of the earliest historical accounts.

Ibn Sa‘d (d. 845) reports on the authority of Muhammad b. Umar al-Waqidi (d. 822), that Imam Malik narrated the story as follows:

> When Abu Ja’far [Caliph Mansur] performed Hajj, he called me. I went to see him and we talked. He asked questions and I replied. Then he said, ‘I have resolved to have several copies made of these books that you have composed. I will send one copy each to every Muslim city. I shall order the people to abide by its contents exclusively. I will make them set aside everything else than this new knowledge, because I find true knowledge in the tradition of Medina.’ I said, ‘O Commander of the faithful! Do not do that. Because the people have received various reports, heard several statements, and transmitted these accounts. Each community is acting upon the information they have received. They are practicing and dealing with others in their mutual differences accordingly. Dissuading the people

> from what they are practicing would put them to hardship. Leave the people alone with their practices. Let the people in each city choose for them what they prefer.' Mansur said, 'Upon my life! Had you complied with my wishes I would have ordered so.'[4]

Malik's advice marks the significance of *ikhtilaf* among the jurists that ensured a jurist's right to differ with others. Imam Malik recognised the fact that disagreements among the jurists were informed, among other causes, by the diversity in reports about the Prophetic *Sunnah* and its transmission, which led to differences in local legal practices. He recommended respecting existing legal practices. This remark, however, must be considered together with Imam Malik's apparently contradictory view expressed in his correspondence with his Egyptian pupil, Layth b. Sa'd (d. 791).

In this correspondence, Malik criticised his pupil for not adhering to the consensus in Medina. Apparently, Layth had changed his views in the course of his travel from Medina to Egypt. In his letter, Layth disagreed with Malik's arguments that the practice in Medina was the authentic *Sunnah* of the Prophet. Layth contended that not all the Companions of the Prophet agreed with the practice in Medina. The Companions even disagreed among themselves on a number of issues. It is unlikely that they did not know the Qur'an and the *Sunnah*, as the first three Caliphs had very keenly transmitted this knowledge. Yet the Companions who went on to different places evolved different practices in matters where there was no direct guidance from the Qur'an. Layth referred to several practices in which the Companions of the Prophet in Syria and elsewhere differed with the practice in Medina.

It is important to analyse this correspondence. Imam Malik, both in reference to Medina and other places, cited local consensus as the basis of authenticity. Layth, on the other hand, legitimised disagreement as a right to differ; 'the Companions of the Prophet and their Successors

disagreed in their individual opinions (*yajtahidun bi ra'yi him*)'.[5] While Malik invoked practice (*'amal*) and consensus (*ijma'*), Layth referred to reasoning (*ijtihad*) and individual opinion (*ra'y*) as juristic tools.

Imam Shafi'i (d. 820), the founder of the Shafi'i school, also discussed differences mostly in terms of geographical locations, particularly with reference to Iraq, Medina and Syria. In his extensive work *al-Umm*, he discussed his disagreement with the jurists in these places. Shafi'i proposed that consensus of the scholars and the *Sunnah* of the Prophet be the criteria for judging the authenticity of *ikhtilaf*, rather than the local consensus that Malik insisted upon. In his treatise, *al-Risala*, written on the request of Caliph Mahdi, Shafi'i pleaded that the disagreement among the jurists be regulated on the basis of the *Sunnah* and *ijma'*. Unlike Ibn Muqaffa', who proposed that the Caliph regulate the disagreement, Shafi'i regarded the community of scholars as more qualified to undertake this task. Shafi'i called for regulating the *ikhtilaf*, yet he also valued it as an important juristic phenomenon, a fact that is observable throughout the history of Islamic law.

In his *History of Islamic Legislation*,[6] Shaykh Muhammad al-Khudri (d. 1927) described how *ikhtilaf* has been one of the prominent characteristics of *fiqh* throughout its history, existing since the days of the Companions of the Prophet Muhammad, namely during the period 11–40 AH / 633–660 CE. There are a number of examples in which the Companions differed with each other on various religious matters. Most of these were cases in which there was no clear guidance from the Qur'an and the *Sunnah*, but there were also differences in interpreting Qur'anic injunctions. As soon as the Muslim Empire began to expand, the Companions began to travel to different areas of the caliphate. Al-Khudri mentioned seven great centres where *fiqh* began to develop as diverse local legal traditions around these Companions. He divided the development of *fiqh* from the seventh to the twentieth centuries into six periods, explaining how *ikhtilaf* prevailed in each period.

After explaining the disagreement among the Companions and their successors during the second and third periods (from mid-seventh to early eighth centuries), Al-Khudri referred to the diversity among the emerging schools of law during the fourth period (between early eighth and mid-tenth centuries), during which the doctrine of *taqlid* was used in an attempt to unify this disagreement. He particularly mentioned debates among the jurists in Iraq, Syria, and Hijaz. During the fifth period (mid-tenth to mid-thirteenth centuries), this disagreement took the form of scholarly debates and controversies; it sometimes turned into sectarian violence. According to al-Khudri, the sixth period (from the thirteenth century onward) saw a continuation of *taqlid*, with no significant development.

In the post-*taqlid* period of Islamic legal thought and practice, definitions of *ijma'* (consensus) and *ijtihad* (legal interpretation) were closely linked with the notions of *taqlid*, *ijma'* and particularly *ikhtilaf*. *Ijtihad* developed a contrastive meaning against *taqlid*, and was, therefore, defined as fresh legislation and hence not allowed in matters already settled by consensus in the schools. The scope of *ijtihad* was demarcated with reference to *ikhtilaf* and *ijma'*. Since *ijma'* had not been institutionalised, consensus in practical terms came to mean the absence of *ikhtilaf*. A jurist could justify the need for reinterpretation only by pointing to differences among the jurists. In recent debates also, traditional jurists have often justified reinterpretation, especially in matters relating to family laws, on the grounds of this diversity of opinions.

Although the differences among the jurists produced diverse and often conflicting opinions, and despite the fact that jurists frequently stressed the need for unifying laws, difference of opinion has been continuously respected in principle. The following list of selected books on this subject sufficiently illustrates the continuity of *ikhtilaf* from the early periods of Islamic legal thought until today.

II. *Ikhtilaf* Literature (798–1987)

The earliest treatises on the subject of *ikhtilaf* were written by Abu Yusuf (d. 798) and Muhammad Hasan Shaybani (d. 803), both disciples of Abu Hanifa (d. 767), the founder of the Hanafi school. These treatises explained their differences with the Syrian Awza'i (d. 777) school, Ibn Abi Layla (d. 765), the Umavi Qadi of Kufa and with the Maliki jurists in Medina. Similarly, al-Shafi'i (d. 820) wrote chapters on *ikhtilaf* in *Kitab al-Umm* and his theory on the subject in his *al-Risala*.

The earliest known book dedicated to *ikhtilaf* was written by Muhammad b. Nasr al-Marwazi (d. 905). Among the popular texts on the subject are the text by Muhammad b. Jarir al-Tabari (d. 922) entitled *Ikhtilaf al-Fuqaha*; the book by Abu Ja'far Ahmad b. Muhammad al-Tahawi (d. 933) with the same title; Ibn 'Abd al-Barr's (d. 1077) *Kitab al-Insaf fi ma bayn al-Ulama min al-Ikhtilaf*; the text by Abu Muhammad Abdullah b. al-Sayyid al-Batlimusi (d. 1127) entitled *Al-Insaf fi al-tanbih ala asbab al-ikhtilaf*; and that by Ibn Rushd (d. 1198) with the title *Bidayat al-mujtahid*. Among the later works, Shah Waliullah's (d. 1762) *Al-Insaf fi bayan sabab al-ikhtilaf* has been widely used. More recently, Abdul Rahman Al Juzayri's *al-Fiqh 'ala al-madhahib al-arba'a* (1970), Mustafa Sa'id al-Khann's Athar *al-Ikhtilaf fi'l qawa'id al-usuliyya fi Ikhtilaf al-fuqaha* (1972) and Taha Jabir al-Alwani's Adab *al-Ikhtilaf fi'l Islam* (1987) illustrate the continuous interest of Muslim jurists in the subject.

Ikhtilaf literature begins by recognising diversity as a natural phenomenon grounded in the teachings of the Qur'an. These works emphasise diversity as a divine blessing because humans differ in their levels of understanding and social settings. The early *ikhtilaf* books are mostly collections of differing opinions by the jurists. Later, the compilers developed theories to explain these differences. One finds at least two approaches to these explanations. One approach seeks to explain the

basis (*sabab*) of the difference with reference to diverse local usages in language, customs and different levels of knowledge of the *Hadith*. The other approach tries to identify the different methods adopted by the jurists or by the schools in their legal reasoning. Ibn Rushd's *Bidayat al-mujtahid* offers a comparative study of *ikhtilaf* among the various schools of law. *Al-Fiqh 'ala al-madhahib al-arba'a* by Al Juzayri and *Al-Fiqh 'ala al-madhahib al-khamsa* by Jawad Mughniya have further contributed to this subject by compiling this disagreement in the Sunni and Ja'fari schools of *fiqh* in the form of compendia of Islamic laws.

Besides this special type of literature, one finds records of disagreement among the jurists on almost every point in almost every *fiqh* book. This regard for diversity is observed to the extent that even those texts that were written abiding by the principle of adherence (*taqlid*) to one of the law schools and even such collections of the schools' doctrine as *Fatawa Alamgiri*,[7] which was sponsored by the Mughal emperor Awrangzeb Alamgir (1617–1708) to regulate judicial practice in seventeenth-century India, do not fail to describe in detail the diversity of opinion and disagreement among the jurists on most legal doctrines.

In the above list, Shah Waliullah's work is particularly important to the advancement of the study of *ikhtilaf*.[8] Shah Waliullah revisited the issue of *ikhtilaf* as a doctrine that was developed in the later period within the framework of *madhhab* and *taqlid*. According to him, the first generation of Muslims disagreed with each other for several reasons. One reason was that not every one of them had access to a complete knowledge of the Prophetic *Hadith*. Their abilities to remember and preserve the texts of the *Hadiths* also varied. They also disagreed in assigning legal value to each report of the *Sunnah*; their criteria of preserving the texts varied. Some gave priority to particular reports, others did not. Also, sometimes they rationalised and applied rules differently. Consequently, they exercised their own reasoning in relation to given issues.

Comparing the grounds for disagreement among the Companions with those of the later jurists, Shah Waliullah concluded that disagreement in the later periods was counterproductive. It moved further away from the formative period when disagreement was a product of *ijtihad*. The practice of *ikhtilaf* declined in the post-*taqlid* period because it was confined within the school doctrines, which were projected as statements by the founders. Adherence to schools (*taqlid*) had an adverse impact and the practice of *ikhtilaf* led to conflicts and clashes among the followers of the different schools.

Waliullah identified the following factors as responsible for this decline. During this period, debates among the schools became very common. Jurists inflated differences in order to defend and prove the superiority of their schools. This produced a new science called *'ilm al-khilaf*, which the debaters mastered. The jurists paid less attention to the true bases and sources of the legal doctrines given by the founders of schools. They came to accept the explanations for the disagreement among the scholars given by the earlier jurists as facts of history. They disregarded the distinction between *ra'y* (reasoned opinion) and literal interpretation of the texts and began to indulge in unnecessary casuistry.

III. Theories of *Ikhtilaf*

The jurists developed various theories of *ikhtilaf* to deal with the disagreements, with at least two objectives: to justify *ikhtilaf* and to reconcile it. I explain some of these theories to illustrate and show their significance and relevance to present-day legal reasoning.

i. Interpretative Disagreements

In a chapter especially dedicated to *ikhtilaf* in his *al-Risala*,[9] Imam Shafi'i

theorised *ikhtilaf*, explaining that it was caused by different understanding of the texts of the Qur'an and the *Hadith*. He developed a typology of disagreement; one that is forbidden and the other that is not. Forbidden disagreement pertains to the opinion that contradicts a clear text of the Qur'an or the *Sunnah*. There is, however, a possibility that where the text is not explicit and clear it may be interpreted in more than one way. Differences based on such interpretation are not forbidden, according to Shafi'i, but it is also not absolutely free from prohibition. Shafi'i explains permissible *ikhtilaf* with several examples.

This brief paper does not allow space to go into a detailed analysis of these examples. Therefore, I will only stress here that he explains this disagreement only in terms of usage of language. For instance, the Qur'an prescribes that a divorced woman wait for three *quru'* periods after the divorce before entering into another marriage contract ('Divorced women shall wait concerning themselves for three monthly periods', *Al-Baqarah* 2:228). The jurists are divided on translating the term *quru'* and calculating this period. According to Shafi'i, some Companions understood it to refer to the 'menstrual' period while others took it to mean the 'purity' period. 'Aisha, the wife of the Prophet, defined it as the period of purity. Shafi'i follows 'Aisha and further cites a saying of the Prophet in his support. Maliki and Shi'i jurists also take the same position. The Hanafis and the Hanbalis define *quru'* to mean menstruation and take the onset of menses as the starting point because it is easy to begin counting from that clear sign. I shall argue subsequently that this disagreement may also be explained as diversity in social norms.

We find further details in the *ikhtilaf* literature about how the jurists disagreed in their understanding of the Qur'an and the *Sunnah*. The Qur'an (*Al-Imran* 3:7) declares that some of its verses are clear (*muhkam*) and others are ambiguous (*mutashabih*). The disagreement concerns how to identify and distinguish the clear from the ambiguous

verses. There is also *ikhtilaf* or difference on how to understand the Qur'anic text. Do we take the Qur'an literally? What does the literal interpretation mean? In understanding words, phrases and concepts, do we look to pre-Islamic Arab poetry or to dictionaries written after the Qur'an was revealed? Do we read each verse individually or examine them in the Qur'an as a whole? Should we try to understand them with reference to the stories of their revelation and historicise them? To what extent do we historicise the context or the occasion when the words were revealed by connecting them to the story? These are all different methods that have been used in the Islamic tradition.

There are also differences of opinions regarding the understanding of *Hadith* texts. In fact, the word *mukhtalaf* (disagreed, disputed) appeared as a technical term first in *Hadith* studies as early as the tenth century.[10] This disagreement related to usage, meaning and mutual contradiction. *Hadith* scholars distinguished between two types of disagreement: one was called *mukhtalaf*, where differences could be explained; the other was *mukhtalif*, where it was difficult to reconcile contradictions and both meanings had to be allowed and explained.[11] The jurists also distinguish between *Hadith* and *Sunnah*; the former as words and text, the latter as action and practice. Do the sayings of the Prophet and his actions have the same legal implications? If there is a conflict between the reported saying and the Prophet's practice, which one will prevail?

More significant was the disagreement about the criteria for an authentic *Hadith*. The *Hadith* scholars devised complex methods to verify the reports of *Hadith* on the basis of reliability of the reporters, chain of narrators linked to the Prophet Muhammad and on the quality of texts. The reports of *Hadith* were categorised on that basis. These studies culminated in collections of sound *Hadith*. These collections shared some agreed reports but disagreed either in text or chain of narrators; they also differed in the number and classification of

Hadith in their collections. It was due to this difference that several other collections were made even after the six collections, which were generally regarded as reliable. Recently, Nasir al-Din Albani published a new collection of *Hadith* in which he differs with the six collections not only in the texts of *Hadith*, but also in questioning the criteria of the earlier collectors.

It is also significant that the jurists and the *Hadith* scholars differed not only in their criteria of what constitutes reliable *Hadith* but also with each other. A crucial debate between the jurists and the *Hadith* scholars had been about the reports in which the chain of narration stops with a Companion; such reports are classified as *mursal*. Most *Hadith* scholars do not regard these *Hadith* reports as reliable. This debate was closely linked with the question of sources of *fiqh*. The *Hadith* scholars insisted that *Hadith* reports were a primary source next to the Qur'an, often overriding the Qur'anic verse because their fundamental function was to explain the meaning of the verse. Among the jurists, Imams Shafi'i and Ibn Hanbal took that position. Other jurists held that if a *Hadith* report was contradictory or contrary to the explicit meaning of the verse, it was not acceptable. Imam Malik regarded the practice and consensus in Medina as the most reliable. The jurists, especially Hanafis, preferred a *Hadith* narrated by a jurist because a narrator who was not familiar with the nuances of jurisprudence may not properly understand the implication of the text.

ii. Theories of Abrogation (*Naskh*)

Sometimes the jurists' references to the Qur'anic verses produced conflicting views. In such situations where the conflict could not be resolved, the jurists invoked the doctrine of abrogation (*naskh*). They argued that the Qur'anic verses cannot contradict each other and therefore one of the conflicting verses must have been abrogated.

The jurists further differ in defining the basis for determining abrogation. One method is chronology of the verses; the verses revealed later abrogate the earlier ones. As is well known, the Qur'an was revealed in parts over twenty-three years, with some parts revealed in Mecca and some in Medina. The collection of the Qur'an is not arranged chronologically; it is difficult to establish the chronology of each verse. There are indications of which chapters (*Surah*) were revealed in Mecca and which in Medina, though most chapters include verses revealed in Mecca as well as in Medina. Some scholars have unsuccessfully tried to rearrange the Qur'an.

Sometimes, the term abrogation refers to change in the circumstances (*sabab* or *sha'n nuzul*) in which the verses were revealed. The verse is regarded as inapplicable and thus abrogated if the circumstances changed. Sometimes, the term abrogation is used simply to mean clarification; namely, if one verse qualifies, provides more details or restricts the application of another verse, the latter is regarded as being abrogated by the former. The doctrine primarily concerns the Qur'anic verses but it was also extended to the *Hadith*.

iii. Theories of Sources

In the formative period, jurists used several other sources in addition to the Qur'an and the *Sunnah*. Imam Shafi'i suggested reducing disagreement by restricting the sources to the following four: the Qur'an, Prophetic *Sunnah*, analogies derived from these texts (*qiyas*) and consensus (*ijma'*). He defined *ikhtilaf* and *ijma'* as parallel opposites: consensus is the absence of disagreement. Imam Shafi'i's four sources theory was popularised by his school, but other schools continued to stress other sources as well. Shihab al-Din al-Qarafi (d. 1285) enumerated nineteen sources used by the jurists.[12] In the *Sunnah*, he included the sayings of the Companions. To *ijma'*, he added the consensus of the people of Medina

and Kufa, and that of the four caliphs and the family of the Prophet. His list of sources included the local customs and the following principles of interpretation as sources: *al-maslaha al-mursala* (public interest which is neither affirmed nor forbidden specifically in the primary sources); *istishab* (presumption of continuity of the past conditions in a ruling); a*l-bara'a al-asliyya* (the principle that things are originally permissible until forbidden); *al-istiqra'* (inductive logic); *sadd al-dhara'i'* (adopting preventive means); *istidlal* (extending the application of a ruling by human reason); *istihsan* (juristic preference); *al-akhdh bi'l akhaff* (choosing the minimum); and *al-'isma* (infallibility of judgement). Other jurists have also added to the list the laws revealed before Islam. Al-Shatibi and some other jurists in the fourteenth century also introduced the notion of *maqasid al-Shari'ah* (objectives of *Shari'ah*), which has become very popular among modern Muslim jurists.

I need not go into details. It is sufficient to say that the jurists differ on the validity of the above sources; some would call them supplementary to the primary four sources. The point is that the number and validity of these sources have been continuously debated by the jurists.

iv. Theories of *Taqlid* and *Madhhab*

I have already mentioned the doctrines of *taqlid* and *madhhab*. These doctrines also emerged as a method of regulating *ikhtilaf*, but in fact schools of law further institutionalised *ikhtilaf*, and disagreement among jurists continued within the schools to the extent that methods had to be developed to regulate it.

The Hanafis developed the method of hierarchy (*qism*, *tabaqat*) of authorities, including jurists and their texts. For instance, in case of conflict among Abu Hanifa, Abu Yusuf and Shaybani, Qadi Khan (d. 907) advised a mufti to adopt the opinion to which Abu Hanifa and

one of his disciples agreed; if there was a conflict between Abu Hanifa and his disciples and the matter related to a change caused by time and space, the mufti should follow the disciples.[13] In Hanafi schools, a list of authoritative books was classified as clear authorities (*zawahir*) compared to solitary (*nawadir*) views within the school. Another method was preference (*tarjih al-rajih*), for which detailed conditions were prescribed and only the qualified jurists were allowed to exercise this right. That method applied to the *ikhtilaf* within the school.

Manuals of fatwa written as guidelines for the muftis, experts whom laymen consulted on legal matters, raised an interesting question relating to *ikhtilaf*. What should a layman do when he finds expert opinions (fatwa) by the jurists divided and conflicting? The manuals advise that the layman is free to choose one of the opinions. These manuals regard disagreement as a positive process of legal development. Such a choice might, nevertheless, lead to dispute and conflict. For instance, if one mufti said that the divorce in question was valid and the other said it was not, the choice of one of these opinions would result in conflict between a husband and his wife. Abu Bakr al-Jassas (d. 980), a Hanafi *qadi* advised that in such a case the husband and wife should go to a *qadi*.[14] Jassas did not discourage disagreement among the jurists; he only gave this advice in the case of disputes among lay persons.

v. Theory of *Mura'at Al-Khilaf*

Malikis also tried to regulate *ikhtilaf* without reducing its significance. In the fourteenth century, Maliki jurists in Andalus developed the doctrine of *mura'at al-khilaf* (recognition of the disagreement among the jurists),[15] which called for taking due consideration of disagreement among the jurists. Initially, this doctrine required avoiding conflict with the preceding, even divergent opinions, but in practice it came to mean liberty to choose any of the differing or conflicting opinions.

IV. The Relevance of *Ikhtilaf* to Family Law Debates Today

The above brief historical overview of *ikhtilaf* and related theories suggest two very important facts about the nature of *fiqh*. First, *fiqh* offers choice among several alternate opinions; second, it is a social construction of the *Shari'ah*. As these points are extremely relevant to present-day debates on Muslim family laws, I will explain them here.

i. *Fiqh* as Alternate Opinion

In order to understand the nature of *fiqh*, we must note that we know very little about the law as it was practised in the premodern period. The history of Islamic law is still to be written; what we have instead is a history of jurists and their schools. We have records of some legislation by the first four caliphs, but we know very little about the laws introduced by the later caliphs, kings and sultans. The doctrine of *ikhtilaf al-fuqaha* can be very helpful in writing this history. We commonly presume that *fiqh* was the source of law in premodern Muslim societies. This assumption identifies *Shari'ah* and law with *fiqh* and thus tends to ignore a very significant contribution that *fiqh* made as an alternate legal system that the jurists built to counter the royal laws. It offers a new perspective on the development of law in Islam, which is particularly relevant to the reform of Muslim family laws today.

In my view, the jurists' insistence on diversity suggests that *fiqh* developed as an alternate set of laws parallel to the then-existing legal system. It was a critique of the contemporary system. This aspect has been overlooked because we do not have sufficient knowledge about how the law operated in practice. Nothing can be said with certainty, and therefore the following points are made to suggest the need for rewriting the history of Islamic law.

It is generally believed that *fiqh* was the law of the caliphate in courts and markets, but the absence of codes and documents on the one hand and continuous diversity in *fiqh* on the other hand questions that view. Records of *qadi* judgements are available only after the sixteenth century. We know from the *Adab al-Qadi* literature that records of the *qadi* judgements were kept meticulously, but since *fiqh* did not recognise them as precedents or as a source of law, they were rarely made part of the *fiqh* texts. Some recent studies show similarity between *fiqh* and these judgements, but it is difficult to conclude that *fiqh* was the only source of law for the *qadis*. The literature on disagreement between *qadis* and jurists suggests that the *qadis* were free to interpret the Qur'an.

The institution of *qadi* was a combination of the *hakam* (arbiter) and the mufti (expert in *fiqh*). In the beginning, the institutions of mufti and *qadi* overlapped each other. During the Umayyad caliphate when the office of *qadi* was defined as a deputy of the caliph and governor, the religious authority of *qadis* became debatable among the jurists. Muftis began functioning as private experts in law. Fatwa became an institution alternate to the *qadi* court during the formative period of Islamic law. We know comparatively more about fatwas than about *qadi* judgements. *Qadis* were appointed and controlled by caliphs. Some of the *qadis* were not qualified jurists and were, therefore, advised to consult muftis. *Fiqh*, though not enforced as caliphate law, served as one of the sources of law for the *qadis*. *Qadis* asked muftis for fatwas on complex issues. While the jurisdiction of *qadis* was limited, fatwas had a larger scope.

From the *Adab al-Mufti* manuals, we also learn why it was possible for the institution of fatwa to develop independent of caliphate law. Apparently, it was because *qadi* judgements addressed specific cases, which were considered ephemeral. These cases could not be generalised to become legal norms. Further, compared to *qadis*, jurists had a comparatively more independent role in the production of legal texts, legal education and fatwas.

Ikhtilaf literature also reveals that most of the jurist doctrines were not derived directly from the Qur'an and the *Hadith*; they were often derived from the opinions and practices of the Companions and their Successors. The *ikhtilaf* literature also refers to the opinion of the Companions (*qawl al-sahabi*) as an accepted source of law. This is particularly true about family laws. Recent studies of divorce laws in Islamic law illustrate how *fiqh* relies more on opinions of the Companions and their Successors than on the Qur'an and the *Sunnah* of the Prophet.[16]

A significant example is the disagreement among the jurists on the requirement of a marriage guardian (*wali*) for a marriage contract to be considered valid. Imams Malik and Shafi'i rule that a marriage contract is not valid without the consent of a marriage guardian. Abu Hanifa, his disciple Zufar, Sha'bi and Zuhri do not consider it a requirement provided the couple is socially compatible. Da'ud al-Zahiri requires a guardian when it is the bride's first marriage and Ibn Qasim regards the presence of a guardian as commendable, but not obligatory. Ibn Rushd analyses this disagreement, pointing out that it came about because there was no clear verse or *Hadith* on the subject. The Qur'anic verses presented by the jurists to justify their views are at best implicit in these meanings. The two *Hadiths* reported by Ibn Abbas and 'Aisha also do not support the jurists' view explicitly. Technically, questions have been raised about both *Hadiths* as to whether they are sayings of the Prophet or the opinions of Ibn Abbas and 'Aisha.[17]

The development of *fiqh* and its diversity suggest that legal interpretation is a continuous process that allows legal norms to remain relevant to social norms. The disagreement among the jurists, particularly on matters relating to family laws, suggests the importance of going behind the text to find universal legal principles that can accommodate social changes.

ii. *Fiqh* as a Social Construction of *Shari‘ah*

From the above overview, it must be noted that the diversity in jurists' opinions and the rise of different schools was geographical in origin; the difference was caused essentially by local practices and customs. This suggests that *fiqh* was a social construction of *Shari‘ah*. In the beginning, the term *fiqh* was used in its literal meaning, namely the understanding of *Shari‘ah*. This understanding was informed by social thought categories, either in the sense that the *Shari‘ah* was revealed in a particular social context or that institutions were built to make *Shari‘ah* socially acceptable. In a theoretical sense, social construction meant harmonising social and legal norms.

As mentioned above, classical *fiqh* scholars sought to explain diversity and difference of opinion as due to varying language usages or different interpretative methods. What is important and missing in these explanations is the social context of these differences. Languages and interpretative differences are closely associated with social norms and institutions, indicating the different social contexts of the speakers. The understanding of certain words even in the same language may differ in different areas where people speak that language simply because language is a social phenomenon. Jurists speak about two types of customs: usage of language (*‘urf qawli*) and social practice (*‘urf fi’li / amali*). Both are called *‘urf*, meaning socially constructed practices. This distinction between words and actions is used particularly in reference to diversity in family laws. For instance, cases of dower (*mahr*) disputes about the amount and mode of payment, or whether specific words connote the meaning of dower, are settled on the basis of the practice in a community. However, the *ikhtilaf* literature usually explains this disagreement as different meanings of a word understood by the jurists.

The social construction of laws is evident from the disagreement among jurists with regard to the matter of apportionment of inheritance for sisters and uterine relatives, namely relations on the maternal side. The Qur'an says that if a man was survived by only one sister, she would inherit half of his estate as inheritance (*An-Nisa* 4:176). According to some jurists, she will also inherit the other half as residue if there was no agnate relative. Shafi'i disagreed with this view: 'Have you not given her the entire estate as a sole survivor, while God prescribed for her only half of it whether she survived alone or with others?'[18] Other jurists cited the Qur'anic verse about uterine relatives (*Al-Anfal* 8:75), but Shafi'i disagreed and dismissed the argument, saying that that verse related to a period soon after the Hijra when inheritance was distributed on the basis of faith relations. The distribution of inheritance was no longer regulated on faith relations after clear verses about succession were revealed. Shafi'i maintained, 'The husband receives a larger share than most uterine relatives. So if you permit people to inherit according to uterine relationship, the daughter would be on an equal footing with the brother, and all the uterine heirs would be entitled to inherit and would have a greater claim than the husband, who enjoys no uterine relationship.'[19] Shafi'i argued that this disagreement arose due to differing interpretations of the two Qur'anic verses. Shafi'i historicised the verses and argued that the verse that related to uterine relatives was no longer applicable. As to the residue, it went to the tribe if there were no agnate relatives.

I suggest that this disagreement may also be explained in terms of different perspectives held by the jurists on patriarchal and matriarchal social structures. Shafi'i seems to be favouring patriarchy and arguing that the opposing opinion would compromise this principle. If we look at the pre-Islamic practice, women and uterine relatives were not given any shares in inheritance. The Qur'an introduced women's shares and

explicitly allowed one half of the estate to be given as share to a daughter and to a sister, if the latter was the only survivor. The Qur'an does not say anything about the residue in this case. In the pre-Islamic practice, only the agnate relatives inherited the estate if the deceased died childless. Shafi'i's position appears to maintain the pre-Islamic patriarchal practice; he replaced tribe with Muslim community.

Another instance of the social construction of *fiqh* relates to Imam Shafi'i's example regarding the disagreement relating to the meaning of *quru'* that was mentioned previously. Shafi'i, Maliki and Shi'i jurists define *quru'* as a period of purity. To Hanafi and Hanbali jurists, it refers to the time of menstruation. Shafi'i explained the disagreement as different meanings of the term. His justification for his view, however, suggests practical difficulties in accepting other views. Shafi'i refers to three possible ways of calculating the waiting period: by lunar month, period of purity or onset of the menses. He explains that calculating by the lunar calendar cannot be considered normative as months vary between 29 and 30 days. He suggests that it is more accurate to count from the period of purity. The Hanafi and Hanbali jurists take the onset of menses as the starting point for calculating because it is a clear sign and therefore it is easy to begin counting from thereon.

In the pre-Islamic Arab society, the waiting period after divorce was apparently counted in terms of lunar months. The Qur'an also mentions three months in case of doubt (*At-Talaq* 65:4). In these explanations, again local practice is ignored. Ibrahim Fawzi[20] studied the pre-Islamic practices and the Qur'anic reforms in family laws and placed jurists' debates in this comparative context. He concluded that in the pre-Islamic Arab practice, the waiting period referred to the period of purity. A husband would divorce his wife in the period of purity and the waiting period ended with the beginning of the next menstruation, as it indicated that she was not pregnant. Islam affirmed the practice of repudiation during the period of purity but extended the duration of

waiting from one to three periods of purity in order to give the couple more time to reconsider the matter of repudiation. Shafi'i's position is again a continuity of Arab customs. This perspective, which is relevant to family laws, is often missing in the *ikhtilaf* literature.

The family is a social institution that regulates relationships between humans. When the Qur'an speaks about the family or about relationships between men and women, it certainly takes the social setting, customs and institutions into account. As Shah Waliullah explains, the material source of Islamic law, especially about family relations, is the pre-Islamic social customs. The Qur'an and the *Sunnah* examined pre-Islamic Arabian practices and customs, reformed those which were unjust, and adopted those which were fair-minded.[21] Shah Waliullah advises that to understand *Shari'ah*, one must examine its material source as well as the method used to implement reform. Referring to the reforms in family law, Shah Waliullah explained that Islam adopted the following pre-Islamic Arab practices and amended those which harmed the rights of women, especially with reference to divorce, dower and inheritance: engagement before marriage, marriage guardian, marriage ceremony, wedding feast, dower, prohibited relations, fosterage, marital rights, divorce and its various types, the waiting period and succession.

When the Prophet introduced reforms to the patriarchal practices, some of his Companions found them difficult to accept.[22] For instance, the verses relating to women's shares in inheritance were viewed as strange by some of the Companions as they said women did not take part in wars and did not bring in any booty, so how could they be allotted shares in property.[23] Examples like this reveal the social context of these reforms and indicate how the patriarchal society reacted to these changes. We cannot appreciate the reforms introduced in the Qur'an and the *Sunnah* without relating them to the social context when they were introduced. The jurists also interpreted the *Shari'ah* with reference to

their social contexts. Today, when the social context has again changed, we need to reinterpret the *Shari'ah* in these new social contexts.

Often, diversity (and the concomitant disagreement) is taken as a negative development; some historians of Islamic law (e.g. Joseph Schacht) describe it as a conflict between theory and practice. I have tried to present it as a dynamic principle in the development of *fiqh*.

In summary, the key points so far are:

1. Diversity in *fiqh* reflects the process of the social construction of the *Shari'ah*.
2. Diversity justifies the continuous need for *ijtihad*, harmonising legal and social norms.
3. Diversity legitimises the quest for new methods of interpretation.
4. Diversity recognises multiculturalism and legal pluralism.

V. The Way Forward: *Ikhtilaf* and the Reform of Family Laws

In the struggle for equality and justice in the Muslim family, the diversity and differences in juristic opinion provide many avenues for the reform of family laws and practices.

First, it is important to understand *fiqh* texts and judgements of the classical times within a social context. It is very clear in reading *fiqh* texts that social contexts were set aside in the jurists' interpretation. So it is necessary to go to commentaries and glossaries of that period to raise the issue of social context. In this way, judgements from that time can help us understand the application of law within a social context. In modern legal studies, we are increasingly studying and teaching case

law to understand law. The same should be applied to *fiqh*—it should be studied and understood in a context.

Those who argue for gender inequality and use the Qur'an and Islam as a source of their legitimacy today also set aside social context. When we try to highlight the social context, we are referred to an ideal context that never existed. We need to understand the issues addressed in Qur'anic revelation and the *Sunnah* not as theology, but as social problems that existed at that time and to which the Qur'an and the Prophet were responding.

Second, we need to know about the development and promotion of schools of law during different historic periods to better understand what led to one school being promoted to the exclusion of others in different regions. We have so internalised the concepts of jurisprudence and socially constructed laws that we often think they are Islamic and divine in origin. For instance, considering Muslim family laws to be personal laws is actually a colonial construct. The colonial state divided laws into customary and common laws to introduce European legal systems and to restrict the application of local laws to marriage, divorce and inheritance. Colonial powers defined these topics in terms of religion and custom in order to exclude them from the general principles of equality and justice. It is ironic that Muslims internalised the idea of personal laws in such a sacrosanct way that no principles of equality and justice could be applied to them. No doubt Muslim family laws are based on principles of justice, but the notion of justice is defined within the framework of social hierarchy as rights and responsibilities are defined in terms of status of a person in society. The concept of a Muslim Personal Status Law needs to be unpacked because it served a particular objective that is leading to inequality and injustice today.

One must remember that choices with regard to the schools of law were made throughout Islamic history based on social context. For instance, official *madhahib* were introduced during the Ottoman

period, but the other Muslim societies did not adopt the idea of an official *madhhab*. The judicial system was pluralist in Egypt during the Mamluk period; there were four or five different *qadis* from different schools, and all of these schools were officially recognised. In the Ottoman period, however, only the Hanafi system was recognised. During the colonial period, the new concept of a codified personal law was introduced. This concept did not exist in the earlier periods. Personal law meant that *Shari'ah* was dissected and only certain parts of the *fiqh* or *Shari'ah* were considered religious and personal. The British then experimented on the Hanafi law in India, developing the 'Anglo-Mohammedan law' that they exported to other British-controlled areas that had different schools of law and customary practices, such as Sudan, Egypt and Malaysia. These influences must be better understood.

A method that reconciles different doctrines from different schools of law, called *talfiq* or *takhayyur*, was introduced in the mid-twentieth century. For instance, in India and Pakistan, the Hanafi law limited judicial divorce to one or two points. In 1939, after extensive discussions and debates, the traditional scholars in India initiated the process of adopting Maliki *fiqh*. When actual cases that demonstrated injustice towards women under the Hanafi doctrine were brought to the attention of these traditional scholars, they took the initiative and suggested reforms. This shows that reforms could take place as new problems emerge.

Third, it is important to understand that the jurists were functioning in their own era based on what they thought was just and were reading and interpreting the Qur'an from their own social perspectives. For instance, in interpreting *An-Nisa* 4:34, all of them tried to qualify what kind of beating should take place. This shows that they were already embarrassed that the idea of beating a wife was in the Qur'an. We should regard their discussions as social efforts which were temporal and also social. From that same line of reasoning, we

must now look at how that justice could be achieved or is possible in the modern era.

Fourth, we need to acknowledge that change has taken place and change is possible. We often think that whatever is in the *fiqh* is in the Qur'an or the *Sunnah* and thus immutable, necessarily dictating how things must be. Yet, to use a classic example, it has been less than 100 years since slavery was abolished, and no one, not even the traditionalists, will propose bringing back slavery or forms of marriage based on slavery. In other areas of law, changes in the modern period have also been accepted and internalised. These are examples that can be used to show why change is possible in family laws.

Fiqh is not divine law that Muslims have a duty to implement. *Fiqh* is juristic law, humanly constructed to deal with times and circumstances. It can change when new times and circumstances emerge. The *madhahib* that developed in history and are still developing did so as a result of social change. They gained authority and currency because of their utility. So we do not need to actually invent new schools, but we should adopt the same method that the jurists in their period were using—pushing for the acceptance of whatever is socially practical and useful.

Finally, in advocating for reform, it is important that women's groups go beyond anecdotes and begin to support their demands for change with data and statistics of the nature and extent of the problems. Given data about the problems, even the most patriarchal and fundamentalist people would have to agree with the analysis of the situation, and justice could then be used as a principle and guide for developing the appropriate solution.

Notes

1 Al-Qur'an: 2:164; 3:190; 10:6; 23:80; 30:22; 45:5.

2 This *Hadith* is cited in al-Nawawi's commentary of *Sahih Muslim*, a book on *waqf*. *Sahih Muslim*, p. 91. Authenticity of this *Hadith* was questioned by several scholars. Al-Khattabi, in his commentary on *Sahih Muslim* mentions that Jahiz and Musili had rejected this *Hadith*, saying that if disagreement was a blessing then agreement would be punishable. Al-Khattabi, however, explains that disagreement here particularly refers to legal matters, not to disagreement in matters of belief.

3 See Schacht, *An Introduction to Islamic Law*, p. 55.

4 Ibn Sa'd, *Al-Tabaqat al-Kubra, al-qism al-mutammim*, p. 440.

5 Al-Khudri, *Tarikh al-Tashri' al-Islami*, pp. 191-7.

6 Ibid.

7 See Masud, 'Fatawa Alamgiri: Mughal Patronage of Islamic Law'.

8 Waliullah al-Dihlawi, *Al-insaf fi bayan sabab al-ikhtilaf*.

9 Khadduri, *Al-Shafi'i's Risala*, pp. 333-52.

10 Ibn Qutayba, *Ta'wil mukhtalif al-Hadith*.

11 See Thanawi, *Kashshaf Istilahat al-funun*, pp. 441-2.

12 Al-Qarafi, *Al-Dhakhira*, p. 141.

13 Qadi Khan, *Fatawa Qadi Khan*, p. 3.

14 Al-Jassas, *Al-Fusul fi'l-usul*, p. 351.

15 For a discussion of al-Shatibi's views on *mura'at al-khilaf*, see Masud, *Shatibi's Philosophy of Islamic Law*, pp. 240-6.

16 Lucas, 'Alternative Methodologies'.

17 Ibn Rushd, *Bidayat al-Mujtahid*, pp. 8-11.

18 Shafi'i , quoted in Khadduri, *Al-Shafi'i's Risala*, p. 345.

19 Ibid., p. 346.

20 Fawzi, *Ahkam al-Usra fi al-jahiliyya wa'l Islam*.

21 Waliullah, *Hujjatullah al-baligha*, p. 124.

22 Fawzi, *Ahkam al-Usra*, p. 188.

23 Ibid.

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